APPEAL NO. 93430

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1993). On May 4, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) injured his neck on (date of injury), and that it was a compensable injury. Appellant (carrier) asserts that the finding of compensable injury is based on no evidence or is against the great weight of the evidence, and that notice and claim were not timely made. Claimant replies that the decision should be affirmed.

DECISION

Finding that the decision and order are supported by sufficient evidence of record, we affirm.

Claimant worked for a car dealer. He injured his lower back in a fall at work on October 18, 1991. Claimant returned to work on approximately October 24, 1991, and on (date of injury), claimant lifted an air cylinder, hurting himself again. He did not remain upright and alerted others to the injury. Without assistance, he drove himself to an emergency room. (Claimant's supervisor in his testimony acknowledges that he was told the day of the incident that claimant hurt his back when he carried an "air tank." We note that if there had been an issue of notice, this admission would support a finding of actual knowledge within 30 days of the accident. *See* Article 8308-5.01 and 5.02 of the 1989 Act.) The emergency room record of (date of injury), reflects a back injury but does not describe a problem with the neck.

The only issue at the hearing was "whether the claimant sustained a compensable injury to his neck on (date of injury)." Both parties agreed with the hearing officer that this was the only issue. There was no request to add an issue as to time of notice or time of filing a claim. Since this question was not raised at the hearing, it will not be considered for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992, and Texas Workers' Compensation Commission Appeal No. 93337, decided June 10, 1993.

The claimant testified that he only hurt his low back on October 18, 1991. He added that when he lifted the air cylinder on (date of injury), he felt pain from his feet to his head. As stated, he had injured his lower back several days before. The fact that he may not have described all his symptoms or even that all his symptoms did not materialize within the first hours of the injury does not, in itself, defeat a claim. *See* Texas Workers' Compensation Commission Appeal No. 92503, decided October 23, 1992, and Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993. Claimant's wife testified about how he felt when she went to the hospital to get him:

Q.Okay, when you picked him up at the hospital, what type of pain was he experiencing?

A.Tremendous pain.

Q.Did he have a headache?

A.Oh, yeah. He said his head felt like it was just going to blow off shoulders. (sic) The back of his head.

Q.Was he experiencing any other pain?

A.He had pain all up and down his back and he just, he was in a lot worse condition than he was when he was from his first injury.

Claimant's wife also testified that claimant fell while being transferred from one wheelchair to another, injuring his neck on October 30, 1992.

Claimant had lumbar surgery in February 1992, and cervical surgery in July 1992, approximately four months prior to his fall from the wheelchair transfer. After seeing his family doctor in October 1991, claimant saw (Dr. P) for the (date of injury), fall in November 1991. Dr P, as reflected by claimant's exhibit 2, in January 1992, states that a review of film shows "a massive herniated disc at C5-6 and also at C6-7 with spinal stenosis." Dr. P writes on June 23, 1992, that claimant was injured a second time at work on October 25, 1991, when he lifted an air tank. He again refers to the herniated disc at C5-6 and C6-7. A CT scan also showed herniation at the C4-5 level. Claimant's exhibit 5 is a discharge summary showing that claimant had "anterior cervical diskectomy and fusion" and was discharged on July 8, 1992.

Claimant testified that several years earlier while working in the oil field, he fell off a derrick and injured his lower back. He added that prior to (date of injury), he never had any problem with his neck.

Carrier asserts that there is no objective medical evidence of the injury. The Appeals Panel views the evidence of various tests that show herniated discs in regard to claimant and surgery to correct injury as objective evidence. However, the Appeals Panel has stated that objective medical evidence is not necessary to sustain a finding of injury. *See* Texas Workers' Compensation Commission Appeal No. 92300, decided August 13, 1992. Carrier's contention states:

To determine whether or not a claimant sustained an injury, the determination must be based on "objective clinical or laboratory findings." See id. at § 1.03 (35). Objective clinical or laboratory findings means "a medical finding . . . based on competent objective medical evidence . . . without reliance on the employee's subjective symptoms." Id.

We observe that the first words omitted from carrier's quotation from Article 8308-1.03(35) are "of impairment resulting from a compensable injury;" the second words omitted are "that is independently confirmable by a doctor, including a designated doctor." Article 8308-4.25(a) of the 1989 Act calls for "evidence of impairment based on an objective clinical or laboratory finding." We note that the first omitted words from the carrier's quote substantially affect its scope since "injury" and "impairment" are clearly distinguishable from each other under the 1989 Act. The Appeals Panel appreciates quotations from any authority that accurately reflect the material.

The hearing officer had sufficient evidence from which to find that the claimant's injury of (date of injury), was compensable and did include injury to the neck; the claimant, his wife, and medical evidence all support this determination. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. A determination of injury under the 1989 Act is generally a factual decision to be made by the hearing officer, which is then reviewed under a standard of sufficiency of the evidence, not under a test of arbitrariness. Notwithstanding that, the decision of the hearing officer is not found to be arbitrary.

The decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge